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92-1916

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1992

JANICE FARELY *ET AL.*,

Petitioners,

v.

COMMISSIONER OF THE MAINE DEPARTMENT OF HUMAN SERVICES AND THE MAINE DEPARTMENT OF HUMAN SERVICES,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

THOMAS H. KELLEY
Counsel of Record
PATRICK ENDE
Pine Tree Legal
Assistance, Inc.
88 Federal Street
P.O. Box 547
Portland, Maine 04112-0547
(207) 774-8211

and

ROBERT E. MITTEL
Mittel, Asen, Eggert & Hunter
97 State St.
P.O. Box 427
Portland, Maine 04112
(207) 775-3101

QUESTIONS PRESENTED

1) Does the state's concededly wrongful withholding of child support, payable to the petitioners under 42 U.S.C. § 657(b), effect a taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2) Do the petitioners have a property interest in child support payable to them under 42 U.S.C. § 657(b), and, if so, does the Due Process Clause of the Fourteenth Amendment require the state to provide a meaningful opportunity for relief from the wrongful withholding of child support?

PARTIES TO THE PROCEEDING

The petitioners, plaintiffs below, are Janice Farley, Barbara Doughty (formerly Barbara Horton), Pamela Harmon, Paula Voltz, Tracy Quirion, Robert Gordon, Mary Jo Halpin, Debra Thompson, Carol White, Nancy Ailes (formerly Nancy Dixon), and Mary Ranquist, on behalf of themselves and a plaintiff class. The respondents are the Commissioner of the Maine Department of Human Services and the Maine Department of Human Services.

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JANICE FARLEY ET AL.,
Petitioners

v.

COMMISSIONER OF THE MAINE
DEPARTMENT OF HUMAN SERVICES, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

Janice Farley *et al.*, by their counsel, respectfully petition for a writ of certiorari to review the judgment of the Maine Supreme Judicial Court in this case.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court, Law Docket No. KEN-92-275 (App. B), is reported as *Farley v. Department of Human Services* at 621 A.2d 404 (Me. 1993). The opinions of the Maine Superior Court, *sub. nom. Horton v. Ives*, (App. C, D, E), are unpublished.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on March 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law...."

The relevant statutory provisions, 42 U.S.C. §§ 602(a)(8)(A)(vi), 602(a)(26)(A), and 657(b), are set forth in Appendix A.

STATEMENT OF THE CASE

1. This case involves the petitioners' efforts to obtain child support payments wrongfully withheld from them by the Maine Department of Human Services (the State). The state court proceedings below ensued from the decision in *Wilcox v. Ives*, 676 F.Supp. 355 (D. Me. 1987), *aff'd* 864 F.2d 915 (1st Cir. 1988), striking down a federal regulation governing the distribution of the $50 child support "pass-through" payment of 42 U.S.C. § 657(b)(1). The petitioner class is a subclass of the *Wilcox* class[1] which includes those who

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[1]The definition of the *Wilcox* class is set forth in *Wilcox v. Petit*, 117 F.R.D. 314 (D. Me. 1987).

responded to a notice about the decision and requested payment of child support they believed had been improperly withheld. The Maine Department of Human Services refused to make retroactive corrective payments, citing sovereign immunity as its reason. The petitioners then commenced an action in Maine Superior Court, maintaining, *inter alia*, that the state had taken their property without just compensation and that the state had denied them due process of law by failing to provide them with proper notice and a meaningful opportunity to be heard.

2. As a condition of receiving Aid to Families with Dependent Children (AFDC), a custodial parent must assign the right to child support payments to the state, 42 U.S.C. § 602(a)(26)(A). Nevertheless, the parent retains the right to distribution from child support collections under 42 U.S.C. § 657(b), including the first $50 of the current monthly child support, any current support in excess of the AFDC grant, and any arrearages not needed to reimburse the state for past assistance. The dispute in *Wilcox* centered on the proper construction of 42 U.S.C. § 657(b)(1), which provides that the first $50 of monthly child support collected by the state is to be paid to the AFDC (custodial) parent. The State, under the federal regulation at issue (45 C.F.R. § 302.51) refused to pay the $50 to the family when no monthly child support was received in one month but a double or multiple payment was received in another month. Instead the State attributed any amount in excess of one month's payment to general support arrearages owed to it by the absent parent.

Both the United States District Court and the United States Court of Appeals for the First Circuit agreed with the *Wilcox* plaintiffs that the regulation impermissibly conflicted with the statute. The U.S. District Court enjoined the State from enforcing the regulation and, at the plaintiff's request, ordered informational notice relief of the type authorized by

Quern v. Jordan, 440 U.S. 332 (1979).[2] *Wilcox*, 676 F.Supp. at 361-362 (*Wilcox* class notice, App. F).

2. The petitioners and the class they represent include all individuals who responded to the class notice required by the United States District Court in *Wilcox* and who sought a determination from the state that they were entitled to corrective child support pass-through payments. The State responded by informing class members that it had no obligation to make retroactive payments. App. G.

The claim of one petitioner, Janice Farley, was actually denied after an administrative hearing, and she filed an individual case in Maine Superior Court *sub. nom. Farley v. Commissioner, Maine Department of Human Services*, in September, 1988. The State refused to grant administrative hearings to all other class members, and the other petitioners filed a class action in Maine Superior Court in December, 1988, *sub. nom. Horton v. Ives*. The plaintiffs in Horton alleged, *inter alia*, that the defendants had deprived plaintiffs "of their property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution" and also "of due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, by failing to give them proper notice and an opportunity to be heard as to the amounts of child support payments they should have received." The plaintiffs stated these claims pursuant to the constitutional provisions cited and 42 U.S.C. § 1983. The *Farley* case was consolidated with the *Horton* case.

The Maine Superior Court reviewed the case upon a

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[2]The *Wilcox* plaintiffs did not request retroactive relief from the federal court, despite the suggestion to the contrary of the court below. *See Farley*, 621 A.2d at 405 ("The Court refused, however, to order retroactive pass-through payments...").

stipulated record. The parties agreed that the plaintiffs and class members had potential claims for corrective $50 "pass-through" payments and that the State refused to make corrective payments from child support collections received before December 29, 1987, the date of the permanent injunction in the *Wilcox* case. The stipulations also noted that until July, 1987, the Department of Human Services "did not provide Aid to Families with Dependent Children (AFDC) recipients with any notice of any opportunity for an administrative hearing if they wished to challenge the amount of child support paid to them." In July, 1987, the State began providing some information on the stub of child support checks, including the statement: "If you believe the amount of this check is incorrect, you may request a fair hearing by writing to...." The parties further agreed that "AFDC recipients did not receive any general notice and explanation of child support "pass-through" payments, until the *Wilcox* class notice...." Until those developments, the State had provided AFDC recipients with only one annual notice of the amount of child support collected.

The Superior Court initially determined, on due process and *res judicata* grounds, that the State had improperly denied the plaintiffs' requests for administrative hearings, but the Court declined to specify what relief, if any, the State was obligated to provide and deferred a ruling on the takings claim. App. C. The Court ordered the State to provide hearings. By agreement the parties reviewed the claims of the plaintiff class and stipulated what the outcome of any hearings would be if the State were required to make corrective payments. Not all class members had claims for corrective payments. The Superior Court then concluded that the plaintiffs had failed to state a takings claim and that sovereign immunity barred the plaintiffs' claims. App. D. The Court affirmed its decision (with a slight modification) upon plaintiffs' motion to amend the judgment. App. E.

3. The plaintiff class appealed to the Maine Supreme

Judicial Court, again citing the Takings Clause, the Due Process clause, and 42 U.S.C. § 1983 in support of their claims. The Supreme Judicial Court, although characterizing the support payments as "wrongfully withheld," concluded that: "[n]o taking has occurred ... because the plaintiffs have no property rights in the pass-through payments at issue..." which are "merely additional welfare benefits." App. *infra* 4a, 10a. Citing this Court's opinion in *Bowen v. Gilliard*, 483 U.S. 587, 594 (1987), the Maine Court further stated that "pass-through payments are a form of AFDC benefits." App. *infra*, 11a. According to the Supreme Judicial Court, the doctrine of sovereign immunity "insulated" the State from any obligation to make corrective payments in the absence of a takings claim. App. *infra*, 12a The Court concluded its opinion with a summary dismissal of the Plaintiffs' claim that due process of law required a meaningful opportunity for relief, reiterating its contention that the plaintiffs have "no constitutionally protected property rights in the pass-through funds at issue..." App. *infra*, 13a.

REASONS FOR GRANTING THE PETITION

A. Introduction

The decision of the Maine Supreme Judicial Court is disturbing in its implications for the many citizens who rely upon the state to collect child support from an absent parent. Since 1974 the states, at the federal government's direction, have become increasingly involved in the collection of support. National public child support collections increased from nearly $4 billion to almost $7 billion from 1987 to 1991. Nearly $5 billion went to non-AFDC families. "Payments of child support to AFDC families, over and above the AFDC payments they received, totaled over $381

million in FY 1991."[3] The proper characterization of the interests at stake presents an important question of federal law which has not been specifically addressed by this Court and which has generated considerable controversy. The resolution of this question will have a substantial impact upon a large number of lower income citizens.

The United States Court of Appeals for the Third Circuit offered a persuasive analysis of this issue in *Bennett v. White*, 865 F.2d 1395 (3rd Cir. 1989), *cert. denied*, 492 U.S. 920 (1989), an opinion which conflicts directly with the reasoning of the Maine Supreme Judicial Court. The *Bennett* case addressed the remedies available to AFDC and former AFDC recipients for the wrongful withholding of child support payments under 42 U.S.C. §§ 657(b)(3), (b)(4), and (c). *Id.* (detailed description of payments at issue found in U.S. District Ct. opinion, 671 F.Supp. 343, 345-348 (E.D.Pa. 1987)). The Third Circuit affirmed "the district court's holding that by collecting and retaining child support payments to which it is not entitled [Pennsylvania] has taken property without compensation." *Id.* 865. F.2d at 1406. Although the *Bennett* decision did not involve the $50 "pass-through" payment, the analytical basis for its decision is equally applicable to Section 657(b)(1) payments. The Third Circuit also expressed Eleventh Amendment concerns[4] but emphasized the duty of state courts to enforce federal rights, citing *Testa v. Katt*, 330 U.S. 386 (1947), *General Oil Co. v. Crain*, 209 U.S. 211 (1908), and other decisions of this Court. Id. 865 F.2d at 1408.

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[3]U.S. Department of Health and Human Services, *Child Support Enforcement: Sixteenth Annual Report to Congress* (1992) at 6.

[4]The Court's solution to its Eleventh Amendment concerns was to order relief from the federal government's share of child support collections. *Id.* 865 F.2d at 1408.

Several other courts have also addressed this issue, albeit in a generally superficial fashion, sometimes confusing Eleventh Amendment issues with an analysis of the property interest at stake. *See Mosley v. Hairston*, 920 F.2d 409 (6th Cir. 1990) (assignment of support rights is unconditional and Eleventh Amendment prohibits retroactive relief); *Beasley v. Harris*, 671 F.Supp. 911 (D. Conn. 1987) (state cannot convert the money of one of its citizens and then shield itself with Eleventh Amendment immunity); *Robertson v. Concannon*, 1990 W.L. 169617 (D. Or. Oct. 26, 1990) (payments cannot be characterized as state funds simply because the state had refused to forward them to custodial parents). *Kenyon v. Sullivan*, 761 F.Supp. 951 (D.R.I. 1991) (Eleventh Amendment prohibits retroactive payments); *Behunin v. Jefferson County Department of Social Services*, 744 F. Supp. 255 (D. Colo. 1990) (motion to dismiss denied because it was premature to characterize money as state rather than private funds.) *Luyando v. Sullivan*, 808 F.Supp. 283 (S.D.N.Y. 1992), *appeal pending* (Eleventh Amendment does not prohibit retroactive relief from subdivisions of the state); *Levesque v. Sheehan*, No. 93-32-P-C (D.Me. May 12, 1993) (concurring with the *Farley* decision and characterizing assignment as unconditional). Variations of these disputes are likely to recur in the absence of a definitive explication of the rights involved.

The failure of the Supreme Judicial Court to properly examine the takings claims resulted not only from its failure to consider the *Bennett* decision and relevant opinions of this Court, but also from its misconstruction of the statutory scheme and this Court's opinion in *Bowen v. Gilliard*, 483 U.S. 587 (1987). Further, the due process comments of the Supreme Judicial Court, taken literally, are so completely at odds with applicable jurisprudence as to warrant summary reversal. Even a more restrained reading of its comments suggests a disturbing lack of commitment to due process of law.

B. The Takings Analysis Of The Maine Supreme Judicial Court Is Seriously Flawed

1. The characterization of the $50 child support payment as "merely a welfare benefit" has a superficial appeal, because Congress could establish a different child support distribution scheme and was not obligated to authorize the $50 "pass-through" payment. The logic of this approach is that an interest subject to such change cannot rise to the level of "property" protected by the takings clause. The Court's opinion in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), exposes the fallacy of this reasoning. The *Monsanto* decision advises us that: 1) property interests are not created by the Constitution but rather stem from an independent source such as state law; 2) intangible rights are protected by the Takings Clause; 3) "reasonable investment-backed expectations" that are subject to statutory change can be the subject of a takings claim. *Id.* at 1001-1011. Thus a pesticide manufacturer's interest in confidential business data submitted to the federal government was potentially protected by the takings clause under a statutory scheme in effect between 1972 and 1978, while the statutes in effect before and after that period did not give rise to any such claim.

The *Monsanto* opinion offers a compelling analogy for the present case. Members of the petitioner class gave up a valuable right, the right to child support, by seeking AFDC, but they did so with the expectation that the State would turn over to them the portion of their support which Congress had reserved to them. Congress remains free to change the system, and participants are free to reassess their participation in it, but while the current system is in place, the State is obligated to pay to the custodial parents the child support that is rightfully theirs. The State's refusal to do so unfairly burdens the petitioners, since they are arbitrarily asked to contribute their child support to the general revenues of the State and federal government.

The case of *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), involving an interpleader escrow fund deposited in a Florida court for the benefit of creditors, is also directly analogous. The Florida statute at issue authorized not only a fee for the management of the fund, but also the Court's retention of the interest accrued during the pendency of a case. This Court held that the retention of the interest was an uncompensated and prohibited taking. The instant case offers a similar example of over-reaching. The State is of course entitled to some of the proceeds of the child support it collects, but it cannot keep more than the amount authorized and "by *ipse dixit*, transform private property into public property without compensation...." *Id.* at 164.

2. Custodial parents and their children generally have a right to child support from the noncustodial parent. *See, e.g.*, 19 M.R.S.A. §§ 214, 301. This right is subject to assignment to the state when an individual applies for AFDC benefits. 42 U.S.C. § 602(a)(26)(A). The petitioners do not argue that the assignment itself is invalid or an improper taking, but they do contend that the assignment does not extinguish their property rights to those child support payments which Congress has reserved to them in 42 U.S.C. § 657. This Court's opinion in *Bowen v. Gilliard* does not endorse a contrary view.

The *Gilliard* decision, while upholding the assignment provisions, did not address either the nature of the assignment or the proper characterization of child support payments. At issue was the validity of a 1984 revision to the AFDC statutes which required all siblings and half-siblings in an AFDC household to be included on the grant. Previously an AFDC parent could exclude a child with independent Social Security or child support income from the AFDC household and thus typically increase household income. This Court held that the amendment, which

required the inclusion of the child in the household and the assignment of the formerly excluded child support rights, did not constitute a taking of the child's income. This change decreased the total household income of many affected families. Congress enacted the $50 child support "pass-through" to mitigate this effect, but this payment would obviously not come from the public treasury. *Gilliard* at 594.

The essential holding of *Gilliard* is that Congress can change the benefits levels of statutory entitlement programs, a proposition with which the petitioners have no quarrel. Support assignment, while valid, is only partial and does not divest them of a property interest in child support, i.e., those support payments Congress has designated as theirs. It is clear that this Court sees child support collections as a central element in assisting needy families:

> [T]hrough the assignment provision the Government takes over the responsibility of making sure that non-custodial parents actually perform their child support obligations. The State also bears the risk of nonpayment of support, since the family receives the identical amount of AFDC (*although not the $50.00 supplement*) whether or not the absent parent makes payments. (emphasis added.)

Id. at 603 n.19. The Court also refers to the State "remit[ting] the amount collected to the custodial parent..." and "supplementing the collections of support money with additional AFDC benefits." *Id.* at 605 and 609. The State posits that the statutory assignment extinguishes any and all interest of the parents in child support payments and that any funds forwarded to them under 42 U.S.C. § 657(b) are gratuities. The *Gilliard* decision certainly does not embrace such a theory and may indeed suggest a more modest role for government.

The petitioner's characterization of the assignment is also more consistent with the law of contracts than the respondent's view. While the State has argued that the language of 42 U.S.C. § 602(a)(26)(A) is unconditional, the distribution provisions of 42 U.S.C. § 657(b) are certainly part of the "contract" between the custodial parent and the State. 42 U.S.C. § 654(5). Thus the concept of a partial assignment, in which the assignor retains an interest in the property or right assigned, is the most appropriate analogy here. *See* Arthur L. Corbin, *Corbin on Contracts*, § 889 (1951 and Supp. 1991). The legislative history of the child support statutes also corroborates this view. *See, e.g.* S. Rep. No. 93-1356, 93rd Cong., 2d sess. *reprinted in 1974 U.S. Code Cong. and Ad. News*, 8133, 8152-8153.

3. The Court below and the respondents have intimated that the $50 "pass-through" is a unique type of payment. One could infer from this that the State might concede that the improper withholding of other types of child support payments could result in a takings claim, e.g. payments in excess of the AFDC grant under 42 U.S.C. § 657(b)(3), payments after the termination of AFDC benefits, 42 U.S.C. § 657(c), or payments to those who never received AFDC, 42 U.S.C. § 654(6). In fact, the State has never made such a concession, even with respect to non-AFDC recipients of support enforcement services. Further, the State has not offered any principled basis for distinguishing between different types of payments, and it is doubtful it could.

One could propose a distinction between AFDC recipients and non-AFDC clients of support enforcement services, but this is by no means a clear line of demarcation. Many non-AFDC clients of the State are likely to be former AFDC recipients (some of whom will return to the program), and frequently in such cases the absent parent has a debt to the State as well as an obligation to his children. Thus the State still has to make a proper allocation of child support between itself and the family. Conversely, there are open AFDC

cases in which a state is able to reimburse itself completely for all assistance paid and have an excess.[5] The statutory scheme directs the state to pay that excess to the AFDC recipient. 42 U.S.C. § 657(b)(4)(B). If the AFDC parent's assignment of support rights divests her of any and all property rights in child support, this is just as true for a subsection (b)(4)(B) payment as it is for a $50 "pass-through". The State could obtain such windfalls and have no obligation to release the support payment to the custodial parent, a result Congress surely did not intend.

It is also clear that Congress did not intend the existence of a support debt to the State to be the determinant of whether an AFDC parent receives a support distribution. If this were the case, the distribution scheme of Section 657(b) would make no sense. The nature of the interest is the same whether the payment is the $50 pass-through or the "excess" payments of subsections (b)(3) and (b)(4)(B). The Secretary of the U.S. Department of Health and Human Services (the Secretary) has stated:

> Under Section 457 of the Act, governing distribution of support collections, there is an interrelationship among paragraphs (b)(1) through (4) which does not leave room for separating out paragraph (b)(1) payments, relating to the $50 pass-through, for special distribution.

56 Fed. Reg. 22340 (1991).

The Secretary has also directed that "Any amount paid under paragraph (b)(1)(3), or (5) of this section shall be

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[5]For example, it is not uncommon for a state to obtain a large sum from an absent parent at one time, e.g. from the sale of an asset upon which it had a lien. The record below offers such examples.

identified as not being an assistance payment." 45 C.F.R. § 302.51(d) (subsections cited correspond to 42 U.S.C. § 657(b)(1), (3), and (b)(4)(B).) This Court has concluded that child support payments from an absent parent are different from a Social Security dependent's insurance benefits under the $50 child support disregard provision of 42 U.S.C. § 602(c)(8)(A). *Sullivan v. Stroop*, 496 U.S. 478 (1990). The Third Circuit noted:

> [T]his is not a case in which the class representatives seek recovery of money raised by the state through its general revenue sources. While the state's general revenues are utilized to pay the state's share (approximately half) of AFDC assistance payments, the monies in dispute here, unlike lawfully offset child support payments, are sums as to which the state never had any legitimate claim.

Bennett, 865 F.2d at 1405-1406. Even the respondents have stated elsewhere that "...Congress recognized the common-sense difference between child support collected from absent parents and AFDC grants paid out of federal and state funds."[6]

The conclusion of the Maine Supreme Judicial Court that the child support "pass-through" payment is "merely a welfare benefit" is at odds with the statutory scheme, and the State's refusal to release wrongfully withheld child support is repugnant to basic constitutional principles embodied in the Takings Clause.

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[6]The respondents made this statement in *Stowell v. Sullivan*, (D. Me.) 812 F.Supp. 264 (D. Me. 1992), *appeal pending*, in arguing that child support payments issued under 42 U.S.C. § 602(a)(28) are not AFDC benefits for the purpose of determining AFDC payment levels. Memorandum of *Amicus Curiae* In Opposition To Plaintiffs' Motion for Preliminary Injunction at 14.

C. The Petitioners Were Denied Due Process of Law

The Maine Supreme Judicial Court committed obvious error in stating that the petitioners' "due process argument must also fail..." because they "have no constitutionally protected property rights in the pass-through funds at issue..." *Farley*, 621 A.2d at 408. Even if the Court were correct in characterizing these child support payments as "merely welfare benefits," its due process assertion directly contradicts the holding of *Goldberg v. Kelly*, 397 U.S. 254 (1970) as well as virtually all case law addressing an AFDC recipient's interest in child support payments. *See, e.g. Bennett v. White*, 865 F.2d at 1404-1405; *Beasley v. Harris*, 671 F.Supp. at 921; *Kenyon v. Sullivan*, 761 F.Supp. at 961; *Lawyer v. Valdez*, 763 F.Supp. 1562, 1569 (D. N.M. 1990); and *Albiston v. Maine Commissioner of Human Services*, No. 92-262-P-C, 1992 U.S. Dist. Lexis 18237 (D. Me. Nov. 5, 1992) (no question that pass-through payments are subject to due process requirements), *appeal pending* (but not on due process grounds). Standing alone, the comments of the Supreme Judicial Court would warrant summary reversal.

Even if we assume the Court below would agree that some process is due, its concept of due process is marred by its lack of commitment to any meaningful opportunity to be heard. A review of the undisputed facts would have shown that, until the *Wilcox* case, the petitioner class had insufficient notice of child support collections and no notice of any opportunity to be heard. When the petitioners finally received such notice and asked for a hearing, the State denied their request. The petitioners' situation was unlike that of the class in *Thiboutot v. State*, 405 A.2d 230, 233 (Me. 1979), *aff'd* sub/nom. *Maine v. Thiboutot*, 448 U.S. 1 (1980), which had received notice and an opportunity to be

heard.[7] Although the Maine Superior Court held that the petitioners here had a right to a hearing, it also permitted that hearing to be a meaningless exercise, i.e. one in which no relief from the wrongful decision was available.

The requirements of procedural due process are not satisfied by empty gestures, and this case presents an appropriate occasion for the Court to exercise its authority to insist that state courts respect constitutional imperatives. In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18 (1990), this Court held that the Due Process Clause required the State of Florida to provide a meaningful opportunity for relief from the collection of an unlawful tax. The Court observed that, since Florida offered no opportunity for a predeprivation hearing, it was required to provide taxpayers not only with a "fair opportunity" to challenge the tax but also to provide a remedy so that "the opportunity to contest the tax is a meaningful one." *Id.* at 39. The petitioners here also had no opportunity for a predeprivation hearing, since the Maine Department of Human Services had collected the child support from the absent parents and deposited the funds in the public treasury long before providing any notice or opportunity to be heard. The *McKesson* decision offers an appropriate precedent for insisting that the State make that opportunity a meaningful one.

The Supreme Judicial Court's arid view of due process has drawn prior comment. In *Gregory v. Town of Pittsfield*, 479 A.2d 1304 (Me. 1984), *cert. denied*, 470 U.S. 1018, 105 S.Ct. 1080, 84 L.Ed 2d. 399, 403 (1985) (O'Connor, J.,

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[7]The stipulated record states that class members had no notice of any hearing rights until the *Wilcox* case, at which the time they tried to appeal. There is no basis for the Maine Superior Court's oblique suggestion that class members had not appealed. App. *infra*, 21a, n.1.

with Brennan, J., and Marshall, J., dissenting from decision to deny cert.), Justice O'Connor questioned the holding that applicants for General Assistance had no due process rights and alternatively had been provided with sufficient due process:

> The reasoning of the Supreme Judicial Court is troubling in its general implications as well as its application in this case.

The failure of Maine's highest Court to respect the dictates of due process calls for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Maine Supreme Judicial Court should be reversed.

Respectfully submitted,

Thomas H. Kelley

Patrick Ende

Robert E. Mittel

Attorneys for
the Petitioners

APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. Title IV-A of the Social Security Act, 42 U.S.C. § 602(a), which sets forth the requirements for a state plan governing Aid to Families with Dependent Children, provides in relevant subsections:

(8)(A) provide that, with respect to any month, in making the determination [of eligibility] under paragraph (7), the State agency should

> (vi) shall disregard the first $50 of any child support payments for such month received in that month, and first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due, with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title);
>
> * * * * *

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required--

> (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed:
>
> * * * * *

2. Title IV-D of the Social Security Act, 42 U.S.C. § 657(b), provides:

> The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall (subject to subsection (d) of this section) be distributed as follows:
>
> > (1) of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due, shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;
> >
> > (2) such amounts as are collected periodically which are in excess of any mount paid to the family under paragraph (1) and which represent monthly support payments shall be retained by the State to reimburse it for assistance payments to the family during such period (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing);
> >
> > (3) such amounts as are in excess of amounts retained by the State under paragraph (2) and are not in excess of the amount required to be paid during such
>
> period to the family by a court or

> administrative order shall be paid to the family; and
>
> (4) such amounts as are in excess of amounts required to be distributed under paragraphs (1), (2), and (3) shall be (A) retained by the State (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing) as reimbursement for any past assistance payments made to the family for which the State has not been reimbursed or (B) if no assistance payments have been made by the State which have not been repaid, such amounts shall be paid to the family.

3. From October, 1984 through December, 1988, the version of 42 U.S.C. § 651(b)(1) in effect provided:

> the first $50.00 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance. . . .

The corollary version of 42 U.S.C. § 602(a)(8)(A)(vi) provided:

> the State agency * * * shall disregard the first $50 of any child support payments received in such month * * *

APPENDIX B

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 6438
Law Docket No. KEN-92-275

JANICE FARLEY, *et al.*

v.

DEPARTMENT OF HUMAN SERVICES

Argued: February 3, 1993
Decided: March 2, 1993

Before WATHEN, Circuit Judge, ROBERTS, GLASSMAN, CLIFFORD, COLLINS and RUDMAN, JJ

RUDMAN, J.

The class plaintiffs, all recipients of Aid to Families with Dependent Children (AFDC), appeal from a judgment entered in the Superior Court (Kennebec County, *Brennan*, J.) barring them from recovering retroactively "pass-through" payments wrongfully withheld by the Department of Human Services (DHS). On appeal, the plaintiffs contend that the DHS's refusal to make those payments constitutes and

unconstitutional taking in violation of both the United States and Maine Constitutions. We affirm the judgment of the Superior Court.

Factual and Procedural Background

This dispute results from the United States District Court's decision in *Wilcox v. Ives*, 676 F. Supp. 355 (D. Me. 1987), *aff'd* 864 F.2d 915 (1st Cir. 1988), that centered on the "pass-through" payment provisions set forth in the complex statutory scheme governing AFDC. AFDC is a cooperative federal-state program that provides monthly welfare benefits to families whose income falls below an established level of need. Pursuant to that scheme, and as a condition of receiving AFDC benefits, the aid recipient must assign to the State any rights to child support that the recipient has against the absent parent. 42 U.S.C.A. § 602(a)(26)(A) (1991); *Wilcox*, 864 F.2d at 916. "The support rights assigned to the State under section 602(a)(26) of this Title...shall constitute an obligation owed to such State by the individual responsible for providing such support." 42 U.S.C.A. § 656(a)(1) (1991).

The subsequent distribution of child support payments assigned to and collected by the State is governed by 42 U.S.C. § 657(b). At the time of the *Wilcox* decision, section 657(b) provided that a certain portion of monthly child support payments received by the State from absent parents would be "passed through" to the AFDC recipient without affecting the recipient's eligibility for assistance.[1]

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[1]In 1988, Congress responded to the *Wilcox* decision by amending the statute. Under the amendment, the $50 pass-through will apply to a monthly child support payment only if the absent parent makes it in the month when it is due. *See* 42 U.S.C.A. § 657(b)(1), as amended by P.L. No. 100-

(continued...)

Specifically,

> The first fifty dollars of such amounts as are collected periodically which representmonthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month.

42 U.S.C.A. § 657(b)(1) (1982 ed.)

The controversy in *Wilcox* centered on the interplay between section 657(b)(1) and a regulation promulgated by the United States Department of Health and Human Services that, in effect, provided that when more than one month of child support arrearages were collected in a given month, only one $50 pass-through was required to be made to the AFDC recipient. 45 C.F.R. § 302.51; *Wilcox*, 864 F.2d at 916-17. The situation contemplated by the regulation arose when no child support payment was received by the State in one month and a multiple payment was then received in a later month. The State's position in *Wilcox* was that the AFDC recipient should only receive a single $50 pass-through; no pass-through for the month in which no payment was received, and only one $50 pass-through for the month in which multiple payments were received. The AFDC recipients argued that families were entitled to multiple $50 pass-throughs for the month in which the multiple payments were received by the State: one $50 pass-through for each month of child support received. *Wilcox*, 864 F.2d 916.

Both the United States District Court and the United States Court of Appeals for the First Circuit agreed with the AFDC

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[1](...continued)
485, § 102; *Wilcox*, 864 F.2d at 926 (Breyer, J., concurring).

recipients, struck down the regulation, and ordered the State, in the future, to make pass-through payments with respect to each month for which child support was collected, even when received in arrears. The United States District Court refused, however, to order retroactive pass-through payments for child support received prior to December 29, 1987, the date of the *Wilcox* decision. The court noted:

> [t]he eleventh amendment bars the Court from awarding retroactive welfare benefits to Plaintiffs where the State does not consent to suit. *Edelman v. Jordan*, 415 U.S. 651, 664-65...(1975), and "[t]he Maine Legislature has not enacted any law manifesting consent that the state be subject to suit for retroactive AFDC benefits."

Wilcox, 676 F. Supp. at 361 (quoting *Thiboutot v. State*, 405 A.2d 230, 233 (Me. 1979), *aff'd* 448 U.S. 1 (1980)).

While the United States District Court did not order retroactive pass-through payments, it did order the State to send a notice to members of the plaintiff class advising them of the court's decision and "of the existence of administrative procedures already available under state law by which they may receive a determination of eligibility for past benefits." *Id.* (citing *Quern v. Jordan*, 440 U.S. 332, 347-48 (1979)).

Accordingly, after receiving the aforementioned notice, the plaintiffs[2] opted to seek recovery of retroactive pass-through

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[2]The plaintiffs and the class they seek to represent in the present case include all individuals: (a) who are members of the plaintiff class in *Wilcox*; (b) who responded to the class notice required by the United States District Court in *Wilcox*; (c) who sought a determination from the Department of Human Services (DHS) that they were entitled to one or

(continued...)

benefits through state administrative channels. One plaintiff, Janice Farley, was denied her claim after a hearing. The other plaintiffs who responded to the *Wilcox* notice received a written determination that they were not entitled to hearings because their claims were for retroactive payments.[3]

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[2](...continued)
more corrective $50 child support pass through payments as a result of the *Wilcox* decision; and (d) whose requests for an administrative hearing and whose claims were denied by the DHS on the ground that it had no obligation to make corrective, retroactive payments.

The members of the plaintiff class in *Wilcox* included AFDC families where: (i) the absent parent had child support payments deducted from his wages on time, but his employer forwarded the withheld wages to the Maine DHS late; (ii) the absent parent was out of state and made child support payments to an out-of-state agency on time, but that agency forwarded the payments to the Maine DHS late; (iii) the absent parent made child support payments directly to the Maine DHS on time, but the DHS improperly credited the payments; and (iv) the absent parent made either lump-sum payments or late child support payments directly to the Maine DHS. *Wilcox*, 864 F.2d at 917.

[3]The relevant portion of the DHS's letter sent to class members stated:

> Effective December 29, 1987, the Department of Human Services has changed the manner in which it administers pass-through payments as a result of the United States District Court's decision in the case of *Wilcox v. Ives*, 676 F.Supp. 355 (D. Me. 1987). Where your request involves child support payments received ***before*** December 29, 1987, your claim is denied and you are not entitled to an administrative hearing.

After their claims were denied, the plaintiffs appealed to the Superior Court pursuant to M.R.Civ.P. 80C. A hearing was held, and the Superior Court remanded the matter to the DHS with an order directing the DHS to conduct hearings on the plaintiffs' requests for AFDC pass-through benefits. Although the hearings were never held, the parties have agreed as to the amounts due to each class member in the event that they are entitled to retroactive relief. After reconsidering the matter, the court rejected the plaintiffs' argument that the denial of retroactive AFDC pass-through benefits constituted an unconstitutional taking and concluded that "[t]he plaintiff class is barred by the doctrine of sovereign immunity from retroactively recovering 'pass through' payments withheld by the Department of Human Services prior to December 29, 1987." This timely appeal followed.

I.

Sovereign Immunity

The defense of sovereign immunity will not insulate the State from liability if it is found to have committed an unconstitutional taking in violation of either the United States or Maine Constitutions.[4] *See Foss v. Maine Turnpike Authority*, 309 A.2d 339, 342 (Me. 1973). "In order for there to be a taking, however, there must be a physical invasion of private property or a substantial impairment of its use and enjoyment." *Wellman v. Department of Human Services*,

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[4]The fifth amendment to the United States Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation." The Maine Constitution, Article 1, section 21, similarly provides that "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it."

574 A.2d 879, 885 (Me. 1990). No taking has occurred, however, because the plaintiffs in the present case have no property rights in the pass-through payments at issue.

The statutory purpose of section 657(b)(1) reveals that pass-through distributions are merely additional welfare benefits. Section 657(b)(1) was enacted in response to another amendment to the AFDC scheme requiring "that a family's eligibility for AFDC benefits must take into account the income of all parents, brothers, and sisters living in the same home." *Wilcox*, 864 F.2d at 919. As a result, the level of benefits to which certain eligible families were previously entitled was reduced. To offset the somewhat harsh impact of the amendment, Congress enacted section 657(b)(1), that provided that:

> Because the 1984 amendments forced families to include in the filing unit children for whom support payments were being received, the practical effect was that many families' total income was reduced. The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefit level.

Bowen v. Gilliard, 483 U.S. 587, 594 (1987) (citations & footnotes omitted). *See also Wilcox*, 864 F.2d at 920 (purpose of section 657(b)(1) "was to provide eligible families with additional support") (quoting *Beasley v. Harris*, 671 F. Supp. 911, 921 (D. Conn. 1987). We therefore conclude, in light of the underlying purpose of section 657(b)(1), that pass-through payments are a form of AFDC benefits.

Under current Maine law, AFDC recipients do not have

property rights in welfare aid. In *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd* 448 U.S. 1 (1980), we held:

> Despite occasional suggestions that the right to welfare aid should be regarded as a property right, as distinguished from a mere gratuity,...not all the rights normally associated with ownership of property are available to recipients under the welfare laws and regulations....In view of the qualified nature of welfare rights, cases denying the defense of state immunity where plaintiff's property has been taken by the state without just compensation can not be relied on as precedents controlling the disposition of a class claim for retrospective welfare benefits.

Id. at 234 (citations omitted).

Since, as discussed in *Thiboutot*, the present plaintiffs held no constitutionally protected property rights in the improperly withheld pass-through funds, their takings claims must fail. "The concept of a taking does not apply to an overpayment of money to the state by a citizen, whether in the form of a welfare reimbursement[,] tax payment, or a fine under a statute later declared unconstitutional." *Wellman*, 574 A.2d at 885. "It would be quite strange indeed if, by virtue of an offer to provide benefits to needy families through the entirely voluntary AFDC program, Congress or the States were deemed to have *taken* some of those very family members' property. *Bowen*, 483 U.S. at 605 (emphasis in original).

As a result of the plaintiffs' inability to successfully assert a takings claim, the State is therefore insulated from any obligation to remit pass-through payments. "In the absence of the State's waiver of its sovereign immunity, that

immunity likewise bars retroactive recovery of AFDC support reimbursements by the plaintiff class in this case." *Wellman*, 574 A.2d at 884 (footnote omitted). The doctrine of sovereign immunity under Maine law was concisely stated in the recent case of *Liberty Mutual Insurance Co. v. Bureau of Labor Standards*, 614 A.2d 1311 (Me. 1992). In *Liberty Mutual*, a certain workers' compensation carrier sought the refund of safety education and training fund assessments paid to the Bureau of Labor Standards. The Bureau asserted sovereign immunity as a defense. We noted:

> We have never held that sovereign immunity is confined to actions seeking damages. *In Cushing v. Cohen*, 420 A.2d [919, 922 (Me. 1980)], we found the doctrine applicable to a declaratory judgment action. In *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd* 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980), we concluded that sovereign immunity precluded judgment against the state for retroactive welfare benefit underpayments to other members of the plaintiff's class. *Id.* at 237. Most recently, in *Wellman v. Dept of Human Services*, we again held that sovereign immunity barred retroactive recovery of payments made to the state.
>
> Sovereign immunity bars Liberty's claim because the state has not waived its immunity by legislative enactment, and Liberty seeks to have the State of Maine adjudicated liable to refund money previously paid to it.

Id. at 1312.

II.

Due Process

The plaintiffs' due process argument must also fail. Specifically, they assert that the DHS's failure to provide a hearing with meaningful relief, i.e., release of pass-through funds, violates their due process rights. Because the plaintiffs, as previously discussed, have no constitutionally protected property rights in the pass-through funds at issue here, we disagree.

> [I]n the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under 42 U.S.C. § 1983 to recover the amount of past AFDC underpayments, at least where there is no allegation or evidence that the underpayments were made in bad faith for a racially discriminatory or other constitutionally impermissible purpose.

Thiboutot, 405 A.2d at 237.

The entry is:

Judgment affirmed.

APPENDIX C

MAINE SUPERIOR COURT

Nos. CV-88-490, CV-88-315

BARBARA HORTON, et al., PLAINTIFFS

v.

ROLLIN IVES, et al., DEFENDANTS

v.

JANICE FARLEY, PLAINTIFF

v.

COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES, DEFENDANTS

Dated: April 27, 1990

ORDER

BRENNAN, Justice, Superior Court

These matters are before the court on a consolidated Rule 80C, M.R.Civ.P. appeal. The parties have requested judgment on a stipulated record. A hearing was held and memoranda were submitted to the court. The court grants

plaintiffs' appeal and remands these matters to the Department of Human Services (DHS) for hearing.

Facts

Plaintiffs are recipients of Aid to Families with Dependent Children (AFDC) who receive pass-through child support payments from the State. In 1987 a federal district court ordered that DHS adjust the pass-through procedure. *See Wilcox v. Ives*, 676 F. Supp. 355 (D. Me. 1987), *aff'd* 864 F.2d 915 (1st Cir. 1988). Before the federal district court decision, DHS passed through only the first $50 from each child support payment received, even if the payment included one or more month's worth of back child support. The *Wilcox* decision required DHS to pass through the first $50 from each month of child support received, whether or not the support was paid on time. (For example, if a spouse paid February, March and April child support payments in April, the recipient spouse would be entitled to a $150 pass-through payment.)

The *Wilcox* decision included a requirement that DHS notify class plaintiffs of their right to a hearing to determine whether they were entitled to additional support payments following *Wilcox*. The federal district court recognized that "the [E]leventh [A]mendment bars the Court from awarding retroactive welfare benefits to Plaintiffs where the State does not consent to suit." 676 F. Supp. at 361 (citations omitted). However, the Court ordered DHS to submit a notice proposal consistent with requirements set forth by the Supreme Court in *Quern v. Jordan*.[1]

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[1]In *Quern*, 440 U.S. 332 (1979), the Supreme Court held that while a federal court cannot order State officials to pay retroactive benefits, it can order the officials to send a notice stating that the federal suit is over and that State

(continued...)

DHS sent the required notice to members of the plaintiff class in April 1988. Plaintiffs in this case are those who responded to the notice and sought corrective payments for child support received by DHS before December 29, 1987--the date of the *Wilcox* decision. Although they received notice, plaintiffs were denied a hearing. Defendant argues that plaintiffs' claims for payments predating the federal district court decision are nonreviewable because *Wilcox* is not retroactive. Plaintiffs argue that defendant agreed to provide notice and a hearing and never indicated that some plaintiffs would not receive a fair administrative hearing.

Issues

Plaintiffs claim that defendant's objections to granting fair hearing rights are barred by the doctrine of res judicata because defendants had the opportunity to litigate those issues in federal district court. The requirements for res judicata are met in this case: 1) both plaintiffs and defendant were parties to the prior suit; 2) there was a valid final judgment; 3) the issue concerning plaintiffs' right to notice and hearing was litigated and any objections could have been raised; and 4) the same cause of action is involved in the prior and the instant suit. *See Kradoska v. Kipp*, 397 A.2d 562, 565 (Me. 1979); *Caporino v. Lacasse*, 511 A.2d 445 (Me. 1986). In the prior litigation defendant Ives agreed to send, and actually did send, a notice stating that: "[a] fair hearing officer will decide whether you have a claim." ("Exhibit A" at 66).

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[1](...continued)
administrative remedies exist by which plaintiffs can pursue corrective payments.

Plaintiffs' argument that their property was taken without just compensation merges into their due process claim. Before there can be a finding that there was an unconstitutional taking there must be a determination that plaintiffs were entitled to the corrective payments. Such a determination would necessarily involve the "process" that plaintiffs allege they have been denied to date. Therefore, the court addresses the deprivation of due process argument rather than the taking issue.

In *Wilcox*, the First Circuit recognized the plaintiffs' property interest in the $50 pass through payments created by 42 U.S.C. § 657(b)(1). The appropriate due process analysis is 1) whether the State has deprived plaintiffs of life, liberty or property and 2) what process is due if there has been a deprivation. *Gregory v. Town of Pittsfield*, 479 A.2d 1304, 1307 (Me. 1984) *cert. denied* 470 U.S. 1018 (1985). In this case, the State has deprived plaintiffs of a recognized property interest. The remaining question is whether plaintiffs' property interest in payments that DHS received before December 21, 1987 entitles them to procedural due process, including a hearing.

Pass-through payment recipients are entitled to procedural due process for the purpose of challenging the amount they receive. *See Beasley v. Harris*, 671 F. Supp. 911, 921 (D. Conn. 1987); *Vanscoter v. Bowen*, 706 F. Supp. 1432 (W.D. Wash. 1988). Defendant argues that plaintiffs in this case were denied a hearing because there is no relief available to them. The case cited in support of this proposition, *Gregory v. Town of Pittsfield*, 479 A.2d 1304 (Me. 1984) concerns general assistance benefits awarded by a municipality, not AFDC payments. In that case, the Law Court held speci-

fically that general assistance applicants are not entitled to federal due process guarantees. Additionally, plaintiffs in *Gregory* received a fair hearing under the applicable State statutory scheme.

Defendant agrees that if this court grants plaintiffs judgment, DHS will review the payments history of the claimants. This review is exactly the type of relief plaintiffs sought when they requested a hearing pursuant to DHS's notice. The court does not instruct DHS as to what the result of the review should be, only that the review take place in the context of the promised administrative hearing. If the DHS hearing officer denies plaintiffs' claims then this court could review that record as final agency action.

Defendant also argues that the district court did not rule on the Eleventh Amendment sovereign immunity issue. While Judge Carter did not explicitly address that issue, the parties did, as per his instructions, issue a notice that conformed with the requirements of *Quern v. Jordan*. That notice did not violate the Eleventh Amendment because it did not order the State to provide retrospective relief; it simply informed plaintiffs in the federal suit of the availability of State administrative remedies.[2] Similarly, this court orders only that the plaintiff class receive the process they were promised in the notice, not that DHS necessarily provide any specific relief in terms of payments.

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[2]The State argues that under *Thiboutot v. State*, 405 A.2d 230 (Me. 1979) *aff'd*, 448 U.S. 1, plaintiffs' suit is barred because of sovereign immunity. The *Thiboutot* case held that a state is immune from a class suit under 42 U.S.C. §1983 for retroactive AFDC payments unless the state waived sovereign immunity.

DHS's actions also violate the Maine Administrative Procedures Act. Due process principles require DHS to provide notice and a hearing pursuant to 5 M.R.S.A. § 9052(1) and (2). Once notice is provided and a hearing requested it "shall be afforded without undue delay." 5 M.R.S.A. § 9056. DHS's letter denying plaintiffs' request for a hearing also violates the intent of 5 M.R.S.A. § 9061 which requires that decisions made after adjudicatory proceedings include findings of fact and notifications concerning rights for review and appeal. In effect, this letter took the place of an adjudicatory proceeding and finding and therefore should have included "notice of the party's rights to review or appeal."

Therefore, it is hereby **ORDERED**:

These matters are remanded to the Department of Human Services for hearing.

DATED: April 27, 1990

/s/ G. Arthur Brennan
Superior Court Justice

APPENDIX D

MAINE SUPERIOR COURT

Nos. CV-88-490, CV-88-315

BARBARA HORTON, et al., PLAINTIFFS

v.

ROLLIN IVES, Commissioner,
Maine Department of Human Services,
DEFENDANT

Filed

DECISION AND ORDER

This matter is before the Court on the Defendant's motion for reconsideration of the Court's Order, dated April 27, 1990, requiring the Department of Human Services to hold hearings on the eligibility of members of the Plaintiff Class to recover "pass through" payments withheld under the AFDC program.

Background

The Plaintiff class were recipients of Aid to Families with Dependent Children (AFDC), a joint federal and state program providing financial assistance to qualified families. As

a condition of eligibility participants had to assign their child support payments to the Department of Human Services (DHS), the state agency administering the AFDC Program. However, federal law required DHS to "pass through" the first $50 of the monthly child support payment to the AFDC recipient. In accord with federal regulations, DHS interpreted the "pass through" provision as encompassing all child support payments received in one month for a recipient regardless of whether the support covered multiple monthly payments. Thus, if DHS received multiple support payments in one month the AFDC recipient received only one $50 "pass through" rather than a "pass through" equivalent to the number of payments received. AFDC recipients brought suit against DHS in the United States District Court. *See Wilcox v. Ives*, 676 F.Supp. 355 (D. Me. 1987).

In *Wilcox v. Ives*, the court held the federal regulation invalid and ordered DHS to desist from its current practice. DHS was ordered to notify AFDC recipients of the decision and their right to pursue administrative remedies. Members of the Plaintiff class requested but were denied administrative hearings. DHS reasoned that a hearing would be to no avail because their right to corrective payments, if any, constituted retrospective relief[1] and any claims to such relief were barred by the State's sovereign immunity. Pursuant to M.R.Civ.P. 80C, the Plaintiffs appealed this decision.

On April 27, 1990, this Court ordered DHS to conduct hearings on the Plaintiffs' claims. Although the hearings have not been held, the parties have agreed to the amounts

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[1]Because of the Eleventh Amendment bar against retroactive relief, the *Wilcox v. Ives* decision applied prospectively. In the instant case, the "pass through" payments had been withheld prior to the *Wilcox* decision on December 29, 1987, and had not been appealed by the class members.

due to each class member in the event they are entitled to retrospective relief. Therefore the issue before this Court is whether the doctrine of sovereign immunity bars the Plaintiff class from recovering the "pass through" payments withheld by DHS.

Discussion

Absent a legislative grant, waiver or evidence of bad faith, racial discrimination or other constitutionally impermissible purpose, the retrospective recovery of AFDC benefits from the state treasury is barred by the doctrine of sovereign immunity. *Wellman v. Department of Human Services*, 574 A.2d 879, 885 (Me. 1990). The State has not enacted special legislation authorizing the Plaintiffs' recovery of corrective payments. Nor has the State waived its immunity by participating in a cooperative program with the federal government. *See Drake v. Smith*, 390 A.2d 541, 545 (Me. 1978). Neither bad faith nor a discriminatory intent was manifested by the State's action. Therefore, the Plaintiff class can prevail only if they can establish that the State's action was undertaken for some other constitutionally impermissible purpose.

The Plaintiff class asserts that the failure to "pass through" each $50 payment was a "taking" in violation of the Maine and United States Constitutions. Under Article 1 § 21 of the Maine Constitution a taking is a physical invasion of private property or a substantial impairment of its use and enjoyment. *Wellman*, 574 A.2d at 885. The overpayment of an AFDC obligation or the underpayment of AFDC benefits is not a "taking" contemplated by Article 1 § 21, *id.*, therefore, the withholding does not carry the constitutional weight necessary to overcome the State's immunity defense.

To support the "taking" argument based upon the fifth amendment to the United States Constitution, the Plaintiffs rely upon *Bennett v. White*, 865 F.2d 1395 (3rd Cir. 1989). In *Bennett* the Court of Appeals affirmed the District Court's holding that funds received by the state agency and subsequently withheld from the intended beneficiaries constituted a "taking". However, there are factual distinctions between *Bennett* and the present case. In *Bennett*, the defendants did not dispute that the withholding was improper and that the funds were in fact the plaintiffs' property. In the instant case, there was no determination that the State acted improperly, and DHS disputes the characterization of the "pass through" as private funds.

On this latter issue, DHS contends that upon assignment and receipt of the child support, the once private funds convert to public monies and subsequent payments issued by the State regardless of their source some from the state treasury. The federal courts are split on this issue; however, the trend is to acknowledge that child support and any benefits derived therefrom are substituted with public funds under the AFDC Program. *See Mosley v. Hairston*, 920 F.2d 409, 417 (6th Cir. 1990); *Johnson v. Cohen*, 856 F.2d 798 (3rd Cir. 1987); *Kenyon v. Sullivan*, 761 F.Supp. 951, 957 (D. R.I. 1991). Given that DHS did not act improperly when it withheld the "pass throughs" and the funds are characterized as public, the "taking" under the *Bennett* decision does not apply.

The Plaintiff class has failed to demonstrate the State's actions constituted a "taking" in violation of the United States or Maine Constitutions. Without such proof the doctrine of sovereign immunity precludes recovery on their claims.

Therefore it is hereby ordered:

> The Plaintiff class is barred by the doctrine of sovereign immunity from retroactively recovering "pass through" payments withheld by the Department of Human Services prior to December 29, 1987.

DATED: February 14, 1992

/s/ G. Arthur Brennan
Superior Court Justice

APPENDIX E

MAINE SUPERIOR COURT

Nos. CV-88-490, CV-88-315

BARBARA HORTON, et al., PLAINTIFFS

v.

ROLLIN IVES, DEFENDANT

Filed

FINAL DECISION AND ORDER

After the Court's Decision and Order of February 14, 1992, Plaintiffs filed a timely Motion to Alter or Amend the Judgment. After hearing upon and consideration of Plaintiffs' Motion, the Court affirms its decision that the doctrine of sovereign immunity bars payment of any Plaintiff Class claims arising before December 29, 1987. Plaintiffs have also requested that the Court supplement its Order of February 14, 1992, and Defendant has no objection to the entry of the following Order. The Court therefore **ORDERS** that:

> Defendant shall make corrective $50.00 "pass-through" payments from any multiple monthly child support funds received on behalf of members of the

Plaintiff Class after December 29, 1987 and before January 1, 1989. The Decision and Order of February 14, 1992 granting judgment for the Defendant is otherwise affirmed and this Order shall constitute the final judgment of this Court.

DATED: May 19, 1992

/s/ G. Arthur Brennan
Superior Court Justice

APPENDIX F

IMPORTANT NOTICE

IF YOU HAVE RECEIVED AFDC BENEFITS AND THE DEPARTMENT OF HUMAN SERVICES HAS BEEN COLLECTING CHILD SUPPORT PAYMENTS ON YOUR BEHALF, YOU MAY BENEFIT FROM A RECENT COURT DECISION. PLEASE READ THIS NOTICE CAREFULLY.

A parent who receives AFDC (Aid to Families with Dependent Children) benefits gives the Maine Department of Human Services the right to collect child support payments from the parent who does not have custody. The Department in turn is required by federal law to pass on some of the child support to the AFDC family. A recent United States District Court case, *Wilcox v. Ives*, Docket No. 85-0342-P, may affect the amount of child support payments you should get.

Federal law requires the Department to pass on to you the first $50 of monthly child support collected. (If you have no income except AFDC, you may get an additional amount, but this case only involves the first $50.) When the Department has received the child support payment in the month it was due, there has generally been no problem in making the correct payment to the AFDC family. There have been problems when the child support payments are received late. For example, if the Department received no child support one month but received two months of payments the next month, it has been making only one $50 payment. The Department's practice was based on a policy of the United States Secretary of Health and Human Services. The United States District Court has decided that this policy is wrong and that the AFDC family should receive two $50 payments

in the above example. The Court has ordered the Department to change its policy.

The Court has ordered the Department to send you this notice and to advise you that you may ask for an administrative fair hearing if you believe the Department has not paid you the correct amount of child support. A fair hearing officer will decide whether you have a claim under Maine law for any additional payment.

You should request a fair hearing in writing and send or deliver your request to the nearest office of the Maine Department of Human Services. You may also contact the nearest office of Pine Tree Legal Assistance, Inc. for advice. (A list of its offices is on the back side of this notice.)

Rollin Ives, Commissioner
Department of Human Services

APPENDIX G

John R. McKernan, Jr.
Governor

Rollin Ives
Commissioner

State of Maine
Maine Department of Human Services
Augusta, Maine 04333

May 17, 1988

Dear Ms.

Thank you for contacting the Administrative Hearings Unit concerning pass-through payments which you believe you may have been entitled to receive.

Effective December 29, 1987, the Department of Human Services has changed the manner in which it administers pass-through payments as a result of the United States District Court's decision in the case of *Wilcox v. Ives*, 676 F.Supp. 355 (D. Me. 1987). Where your request involves child support payments received *before* December 29, 1987, your claim is denied and you are not entitled to an administrative hearing.

Please note that the Department will keep your name, address and case on file should any change occur in the law. The Department will notify you of any change in the law which may affect your right to receive pass-through payments for child support payments received prior to December 29, 1987.

Very truly yours,

Sabra Burdick
Director
Bureau of Income Maintenance

Supreme Court, U.S.
F I L E D
JUL 30 1993
OFFICE OF THE CLERK

No. 92-1916

In the Supreme Court of the United States

October Term, 1993

JANICE FARLEY, et al.,

Petitioners,

v.

COMMISSIONER OF THE MAINE DEPARTMENT OF HUMAN SERVICES and MAINE DEPARTMENT OF HUMAN SERVICES,

Respondents.

Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL E. CARPENTER
Attorney General

THOMAS D. WARREN
Deputy Attorney General
(Counsel of Record)

FRANCIS E. ACKERMAN
Assistant Attorney General
Department of Attorney General
State House Station 6
Augusta, Maine 04333
(207) 626-8800

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Maine Supreme Judicial Court correctly held that the State's denial of petitioners' claims for retroactive AFDC pass-through benefits did not constitute a taking violative of the Fifth and Fourteenth Amendments.

2. Whether the Maine Supreme Judicial Court correctly held that petitioners' claim that they were entitled to retroactive AFDC pass-through benefits as an essential element of procedural due process was barred by the doctrine of sovereign immunity.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Commissioner and Maine Department of Human Services (collectively "the State"), submit that the petition should be denied because the decision of the Maine Supreme Judicial Court was correct and because there are no special or important reasons to grant *certiorari*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners' due process claim for retroactive AFDC pass-through benefits was brought pursuant to 42 U.S.C. §1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Also pertinent to the Court's analysis of the AFDC statutory scheme, in addition to the constitutional and statutory provisions set forth in the petition, is 42 U.S.C. § 656(a)(1), which provides: "The support rights assigned to the State under

section 602(a)(26) of this title or secured on behalf of a child receiving foster care maintenance payments shall constitute an obligation owed to such State by the individual responsible for providing such support."[1]

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1 Note that petitioners' rendering of 42 U.S.C. § 602(a)(8)(A)(vi), App. 1a, contains minor textual inaccuracies. In addition, the provision reproduced by petitioners at App. 3a¶3 is actually 42 U.S.C. § 657(b)(1)(1982 ed., Supp. III), not 42 U.S.C. § 651 as advertised.

STATEMENT OF THE CASE

This petition represents the last gasp in a saga of welfare litigation begun in *Wilcox v. Ives*, 676 F.Supp. 355 (D.Me. 1987), *aff'd* 864 F.2d 915 (1st Cir. 1988).

In *Wilcox*, the plaintiffs challenged a federal regulation governing the distribution of so-called "pass-through" payments to AFDC recipients. The regulation was invalidated as inconsistent with the governing statute, and prospective relief was ordered. In its decision the U. S. district court expressly noted that retroactive relief was barred. 676 F.Supp. at 361. The petitioners then sought retroactive relief in the state courts, resulting in the decision with respect to which they now seek *certiorari*. This sequence and its legal context are more fully recounted below.

The $50 pass-through mandated by the federal AFDC statute represents a portion of the child support moneys assigned to the State by each AFDC recipient as a condition of receipt of benefits, and thereafter collected by the State from absent parents. 42 U.S.C. § 657(b)(1)(1982 ed., Supp. III)(pass-through); 42 U.S.C. §§ 602(a)(26), 656(a)(1)(assignment). Enacted as an amendment to the AFDC statute in 1984, the pass-through was intended to offset the reduction in welfare benefits caused by a related, contemporaneous amendment which required

inclusion in the AFDC filing unit of all family members living in the home for purposes of determining income, eligibility and benefit levels. *See Bowen v. Gilliard*, 483 U.S. 587, 594 (1987). The pass-through is thus not a mere "bonus" unrelated to regular AFDC benefits, but "an integral element of the AFDC support system envisioned by Congress". *Wilcox*, 864 F.2d at 919-920.

The federal regulation challenged in *Wilcox* provided that even where more than one month of child support arrearages were collected in any given month, only one $50 pass-through was required to be made to the AFDC recipient for that month. 45 C.F.R. §302.51; *see Wilcox*, 864 F.2d at 916-917 (quoting text). Until the date of the final judgment in *Wilcox*, this regulation had the force of positive law, and the State complied with it faithfully.

In the *Wilcox* final judgment, the district court struck down the regulation, ordering prospective and notice relief, but not retrospective relief, which, it held, was barred by the Eleventh Amendment. *Wilcox*, 676 F.Supp. at 361. The State provided the required notice and altered its practice to bring it into full compliance with this order.

Subsequently, in 1988, Congress responded to the *Wilcox* decision by amending the governing statute. Under the amendment, only one $50 pass-through is

generally required even when several months of arrearages are collected at once, unless the absent parent made each child support payment in the month when it was due. *See* 42 U.S.C. §657(b) as amended by P.L. No. 100-485, §102. As Judge Breyer noted, Congress thereby adopted the Secretary's original position in large part. *Wilcox,* 864 F.2d at 926 (Breyer, J. concurring). The State's practice was again altered to accord with this amendment.

After the First Circuit's decision in *Wilcox,* Petitioners initiated this case at the administrative level, requesting the State to provide the retrospective relief which had been unavailable in *Wilcox* because of the Eleventh Amendment bar. The State denied their request on sovereign immunity grounds. Petitioners then brought suit in Maine Superior Court pursuant to 42 U.S.C. §1983 challenging the denial as an uncompensated taking, violative of constitutional prohibitions. They also asserted their right to due process hearings, maintaining further that, in order to be meaningful, the hearings must result in relief in the form of retroactive AFDC benefits.

On appeal, the Maine Supreme Judicial Court held that there had been no taking, since petitioners had "no property rights in the pass-through payments at issue" which were cognizable under the takings clause; and further held that petitioners' due

process claim was barred by the doctrine of sovereign immunity. *Farley v. Department of Human Services*, 621 A.2d 404, 406, 408 (Me. 1993), App. 10a, 13a.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE MAINE SUPREME JUDICIAL COURT ACCORDS FULLY WITH CONTROLLING PRECEDENTS ESTABLISHED BY THIS COURT.

A. *Bowen v. Gilliard* Requires The Conclusion That The State's Denial Of Retroactive AFDC Pass-Through Benefits Did Not Represent An Unconstitutional Taking.

The petitioners contend that the State's denial of retroactive AFDC pass-through benefits violates the takings clause of the federal constitution. In order to prevail on this claim, however, petitioners must show that a right to receive such pass-through benefits is cognizable as property under the takings clause. This they cannot do.

Under the AFDC statute, pass-through benefits are accorded to a welfare recipient in lieu of a portion of the child support payments assigned to the State by the recipient as a condition of the receipt of regular benefits. 42 U.S.C. §657(b)(1); *and see* 42 U.S.C. §602(a)(26). Accordingly, a right to receive pass-

through benefits can be no greater that the underlying right to receive child support payments which was assigned to the State.

This Court has determined that the statutory assignment itself does not effect a taking, since, prior to the assignment, a child in whose behalf support payments are received "holds no vested protectable expectation" that such payments will continue. *Gilliard*, 483 U.S. at 607; *and see Johnson v. Cohen*, 836 F.2d 798, 807 (3rd Cir.1987)(*Gilliard* conclusively held that no property interest cognizable under the takings clause existed in child support payments). If an AFDC recipient holds no property interest cognizable under the takings clause in child support rights, even *prior* to the statutory assignment of such rights to the State, it follows that after the assignment, *a fortiori*, the recipient holds no cognizable property interest in the pass-through benefits which she receives in lieu of child support.

The logic of *Gilliard* thus poses an insuperable barrier to petitioners' takings claim. Their attempt to circumvent this barrier by positing that the statute somehow constitutes a "'contract' between the custodial parent and the State" must surely be unavailing. Petition, 12. Subject to the Constitution,

a statute is the law of land. It is not a contract, and is not susceptible to analysis as such.2/

The constitutional takings issue raised by petitioners in this case is not new. It was conclusively resolved by this Court in *Gilliard*. In effect, though they do not say so, petitioners have asked this Court to consider overruling an established precedent of long standing; yet they fail to directly confront the logic of that precedent. Under these circumstances, there is no reason to grant *certiorari*.

B. The Conclusion That Petitioners' Due Process Claim Is Barred By The Doctrine Of Sovereign Immunity Is Required By This Court's Holding In *Will v. Michigan Department Of State Police.*

The petitioners next maintain that the State's denial of retroactive AFDC pass-through benefits violates constitutional due process requirements. However, petitioners' due process claim, prosecuted pursuant to 42 U.S.C. § 1983, cannot be described

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2/ Even without *Gilliard*'s unequivocal holding to the effect that an AFDC recipient has no property right cognizable under the takings clause in child support payments, the recipient would *still* have no cognizable property right in pass-through benefits, since under the statute, all child support rights are unconditionally assigned to the State. *Mosley v. Hairston*, 920 F.2d 409, 417 (6th Cir.1990).

otherwise than as a claim for retroactive monetary relief against a State.[3/] This Court has conclusively ruled that retroactive monetary relief is not available to plaintiffs, whether in state or federal court, in section 1983 suits against a State, since neither a State nor a state official sued in her official capacity for retroactive monetary relief is a "person" within the meaning of the statute. *Will v. Michigan Department of State Police*, 109 S.Ct. 2304, 2312 (1989).

Will's rationale can be traced to *Quern v. Jordan*, 440 U.S. 332 (1979). In *Quern*, this Court made clear that in enacting section 1983, Congress had not intended to override "the traditional sovereign immunity of the States" embodied in the Eleventh Amendment. 440 U.S. at 341. *Will* laid to rest any lingering doubt as to whether section 1983 afforded plaintiffs any greater latitude in state than in federal court, resolving that question in the negative. *Hafer v. Melo*, 112 S.Ct. 358, 364 (1991), citing *Will*, 109 S.Ct. at 2309.

3/ Any attempt by petitioners to impose another characterization, by subsuming a recovery of retroactive pass-through benefits within an injunction mandating "meaningful" due process relief, should be recognized for what it is: a brazen end-run around the rule of *Edelman v. Jordan*, 415 U.S. 651, 665-669 (1974)(a court may not evade the prohibition against an award of retroactive monetary relief by fashioning it in the form of an equitable decree). *See Mosley*, 920 F.2d at 417.

Will is thus dispositive of petitioners' section 1983 due process claim. In view of this controlling precedent, the Maine Supreme Judicial Court's determination that petitioners' due process claim was barred by sovereign immunity must be regarded as unexceptionable.[4/]

Yet petitioners completely ignore *Will*. Instead, they rely on *McKesson Corp. v. Division of Alcoholic Beverages*, 110 S.Ct. 2238 (1990). This reliance is misplaced, since *McKesson*, which involved a claim that the State of Florida had exacted an unconstitutional tax, was brought under a state statute authorizing suits for a tax refund. Unlike the present case, *McKesson* was not a section 1983 claim for retroactive monetary relief. Moreover, as this Court expressly noted, the defendants in *McKesson* "concede[d] that the State waived any sovereign immunity from suit". 110 S.Ct. at 2257 n.34. Here, in contrast, there has been *no* waiver of sovereign immunity.

4/ While it did not cite *Will*, Maine's highest court relied on one of its own decisions which accurately prefigured *Will*, holding that the State "may constitutionally interpose [sovereign] immunity as a bar to a class action brought in a State court under 42 U.S.C. §1983 to recover the amount of past AFDC underpayments". *Thiboutot v. State*, 405 A.2d 230, 236-237 (Me.1979), *aff'd* 448 U.S. 1 (1980)(relying on *Edelman* and *Quern*). *See Farley*, 621 A.2d at 408, App. 13a.

Again, without saying so, petitioners have in effect asked this Court to reconsider and overrule its own clearly established precedent, namely, *Will*. Yet they have utterly failed to come to grips with the rationale underlying that decision. Again, therefore, this Court should have no difficulty in declining to grant the requested writ.

II. THE DECISION BELOW RAISES NO ISSUE WARRANTING FURTHER REVIEW.

A. This Case Focuses Retrospectively on Statutory and Regulatory Provisions Which Are No Longer In Effect.

The significance of this case is limited. While it obviously means something to petitioners on the one hand, and respondents on the other, it carries few implications for anyone else. This is because the statutory and regulatory regime within which the case arose has undergone substantial change.

First, the regulation which mandated only a single monthly pass-through, regardless of how many child support payments were collected, was struck down by *Wilcox*. Then the new regime mandated by *Wilcox* (one pass-through for every payment collected) was superseded in its turn by the 1988 statutory amendment which now governs. The rule of *Wilcox* held sway for less than a year.

This case will therefore have no prospective impact. Its retrospective impact is no broader than the class represented by petitioners. In view of the limited significance of the case,[5/] this Court should reject petitioners' implicit challenge to the settled law of *Gilliard* and *Will*, and should deny *certiorari*.

B. The Decision Below Conflicts With Neither *Bennett v. White* Nor Any Other Case Law To Which Petitioners Can Point.

Petitioners suggest that the decision of the Maine Supreme Judicial Court is in conflict, variously, with *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Bennett v. White*, 865 F.2d 1395 (3rd Cir.1989), *cert. denied* 492 U.S. 920 (1989). Petition, 7, 15. We address these contentions in turn.

Petitioners' claim that the decision below conflicts with *Goldberg* is based on the Maine court's statement that "the plaintiffs ... have no constitutionally protected property rights in the pass-through funds at issue here." In our view,

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5/ *See, Wilcox*, 864 F.2d at 926 (Breyer, J., concurring) ("because a contrary decision would not significantly affect AFDC law," it would be "pointless, and somewhat inappropriate, to dissent").

petitioners have taken this statement out of context.6/ We need not debate the merits of this issue here, however, because the statement in question was at most *obiter dictum* and, accordingly, harmless. The Maine Supreme Judicial Court did *not* base its holding on a finding that there was no denial of due process in this case. Rather, relying quite properly on *Thiboutot*, the court held that

> in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under 42 U.S.C. § 1983 to recover the amount of past AFDC underpayments....

Farley, 621 A.2d at 408, quoting *Thiboutot*, 405 A.2d at 237, App. 13a. This holding does not conflict with *Goldberg*; on the contrary, it is in full accord with the controlling jurisprudence of *Will*, *Edelman* and *Quern*.

Nor does the Maine court's decision present any

6/ While a right to pass-through payments may constitute a sufficient claim of entitlement to require due process under *Goldberg*, such a right clearly does not constitute property for purposes of the takings clause under *Gilliard*, as we demonstrate above. *See* this brief, *supra*, 4-5; *and see Thiboutot*, 405 A.2d at 235 ("the qualified nature of welfare rights makes a takings argument inapplicable").

conflict with *Bennett v. White*. In *Bennett*, the Third Circuit held that where Pennsylvania failed to pay over to recipients child support payments collected in excess of reimbursible benefits provided, an uncompensated taking, violative of the Fifth and Fourteenth Amendments, had occurred. 865 F.2d at 1402; *see* 42 U.S.C. §§ 657(b)(3), 657(c). However, *Bennett* did not deal with a denial of retroactive pass-through benefits, as this case does, but with multiple failures by Pennsylvania authorities, *inter alia*, to reassign support orders on termination of assistance, to promptly pay over collections made after termination of assistance, to pay over support collected in excess of what was due the State as reimbursement, and to cease support collections within three months after termination of assistance. 865 F.2d at 1401. Unlike the State of Maine here, Pennsylvania could not justify its actions in *Bennett* by pointing to federal regulations.

Indeed, crucial to a correct understanding of *Bennett* is the fact that the State defendants in that case *did not dispute that they were holding property belonging to plaintiffs*.[7/] In effect, Pennsylvania thereby conceded that a taking had occurred.

In this case, in contrast, the State of Maine does

7/ 865 F.2d at 1402 ("defendants do not dispute that ... [the State] held on to class members' property"); *and see Bennett v. White*, 671 F.Supp. 343, 349 (E.D.Pa. 1987)(to same effect).

not concede that the pass-through payments in issue were petitioners' property in any sense cognizable under the takings clause. On the contrary, the child support moneys underlying the pass-through were fully assigned to the State. Moreover, since the statutory assignment does not itself effect a taking, *see Gilliard*, it necessarily follows, *a fortiori*, that a denial of pass-through payments does not effect a taking either.

Bennett is therefore inapposite, and presents no conflict with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 2, 1993

Respectfully submitted,

MICHAEL E. CARPENTER
Attorney General

THOMAS D. WARREN
Deputy Attorney General
(Counsel of Record)

FRANCIS E. ACKERMAN
Assistant Attorney General
State House Station 6
Augusta, Maine 04333
(207) 626-8800

FILED
SEP 27 1993
OFFICE OF THE CLERK

No. 92-1916

In The Supreme Court of the United States

OCTOBER TERM, 1993

JANICE FARLEY *ET AL.*, *Petitioners,*

v.

COMMISSIONER OF THE MAINE DEPARTMENT OF HUMAN SERVICES AND THE MAINE DEPARTMENT OF HUMAN SERVICES,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

THOMAS H. KELLEY
Counsel of Record
PATRICK ENDE
Pine Tree Legal
Assistance, Inc.
88 Federal Street
P.O. Box 547
Portland, Maine 04112-0547
(207) 774-8211

and

ROBERT E. MITTEL
Mittel, Asen, Eggert & Hunter
97 State St.
P.O. Box 427
Portland, Maine 04112
(207) 775-3101

BEST AVAILABLE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 92-1916

JANICE FARLEY *ET AL.*,

Petitioners,

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COMMISSIONER OF THE MAINE DEPARTMENT
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PETITION FOR A WRIT OF CERTIORARI
TO THE MAINE SUPREME JUDICIAL COURT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

A. Introduction

The Respondents' Brief in Opposition is deeply flawed by misreadings of relevant precedent, in particular this Court's opinions in *Bowen v. Gilliard*, 483 U.S. 587 (1987) and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18 (1990) as well as the decision in *Bennett v. White*, 671 F.Supp. 343 (E.D.Pa 1987), *aff'd in part*, 865 F.2d 1395 (3rd Cir. 1989), *cert. denied*, 492 U.S. 920 (1989). Notwithstanding the Respondents' rhetorical device of characterizing the child support payments in dispute as AFDC benefits, there is no controlling precedent, and the issues raised by this Petition are likely to continue to create conflict until resolved by this Court.

B. The *Gilliard* Decision Does Not Address the Present Controversy And Does Not Hold that a Custodial Parent Has No Property Interest In Child Support Rights.

This Court, citing *Layton v. Layton*, 263 N.C. 453, 456, 139 S.E. 2d 732, 734 (1965) (child support obligation does not continue after the death of the responsible parent and is not a debt of the estate), stated in *Gilliard* that "the child receiving support payments holds no vested protectable expectation that his or her parent will continue to receive identical support payments...." 483 U.S. at 607. The Respondents leap from this undisputed point to the illogical and specious conclusion that "...an AFDC recipient holds no

property interest cognizable under the takings clause...even *prior* to the statutory assignment of such rights to the State..." (emphasis in original). Respondents' Brief in Opposition at 7. This Court's observation about future child support does not in any way suggest that a parent or child has no property interest in accrued or ongoing child support payments.

A custodial parent's interest in child support has deep and long-standing roots. *See*, e.g., *Dunbar v. Dunbar*, 190 U.S. 340 (1903) (child support obligation not discharged by bankruptcy) and *Gilley v. Gilley*, 79 Me. 292, 9 A.263 (1887) (common law allowed mother to maintain action of assumpsit for child support). The Supreme Judicial Court has very recently reiterated "that the 'right to the payment of child support becomes vested as it becomes due'". *Allen v. Allen*, ___ A.2d ___, Docket No. Oxf-92-478 (Me.) (Slip Op. August 13, 1993) (citations omitted). This is certainly the type of economically valuable interest which, albeit subject to modification, is protected by the Takings Clause.[1]

The Respondents also argue, as anticipated,[2] that any property interest that may exist in child support is extinguished by the AFDC parent's assignment of rights to the State. The statutory scheme simply does not support this contention, and it is a "cardinal rule [of construction] that a statute is to be read as a whole...since the meaning of statutory language, plain or not, depends upon context." *King v. St. Vincent's Hospital*, 502 U.S. ____, 112 S.Ct.

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[1]*See* Peterson, *The Takings Clause: In Search of Underlying Principles--Part II--Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL.LAW REV. 53, 62-63 (1990).

[2]See the Petition for Writ of Certiorari in this action at 10-14.

570, 116 L.Ed.2d 578, 586 (1991). The support enforcement statutes clearly provide for the distribution of some child support to the custodial parent even after the assignment. The Petitioners' prior reference to a "contract" (quotations in original)[3] is also relevant to a proper construction of the statute, since the term assignment derives from the law of contracts. The statutory provision at issue is more analogous to a partial assignment than to an unconditional assignment.[4] The *Gilliard* decision merely upholds the validity of the required assignment. It does not address its scope and should not serve as a shield for the State's unlawful retention of child support.

C. This Court's Holding in *McKesson* Provides an Appropriate Basis for Review of the Petitioners' Due Process Claim.

The Respondents contend that the Petitioners' due process claim is foreclosed by this Court's decision in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Citing a footnote, they also argue that the *McKesson* opinion turns on a waiver of state sovereign immunity and is thus distinguishable from the present case. These contentions miss the mark.

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[3] *Id.*

[4] The Maine Supreme Judicial Court has acknowledged in another context that an AFDC parent has an interest in child support separate and distinct from the State's. *See Department of Human Services v. Vining*, 617 A.2d 555 (Me. 1992). (Affirming the dismissal for lack of prosecution of a paternity action brought by the State, as to the State, but remanding for possible prosecution by the custodial parent).

This petition arises out of two separate cases, later consolidated in the Maine Superior Court, which raised various federal and state constitutional and statutory claims, including claims pursuant to the Due Process Clause and 42 U.S.C. §1983. As the Petitioners noted below,[5] the Supreme Judicial Court was authorized to rule in the class's favor on constitutional grounds alone, even if *Will* interposed a barrier to a Section 1983 claim. Indeed, both the Superior Court and the Supreme Judicial Court addressed the due process claims directly without reference to *Will*. The *McKesson* decision clarifies that the Due Process Clause by itself can provide a basis for retroactive monetary relief against a state.

The *McKesson* opinion also reaffirms certain fundamental points, in particular that: 1) "the Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from State Courts", 496 U.S. 31, and 2) the Due Process Clause requires the States to provide either a predeprivation hearing or a postdeprivation process that offers meaningful retroactive relief. This Court recently affirmed its commitment to *McKesson* in *Harper v. Virginia Department of Taxation*, 61 U.S.L.W. 4664, 4667-4668 (June 18, 1993).

The complainants in *McKesson* objected to a Florida tax on Interstate Commerce Clause grounds and sought the return of taxes already paid through a state refund suit. While agreeing with the taxpayers' challenge, Florida's highest Court declined to authorize a refund, citing "equitable" considerations, *i.e.* the State's supposed good faith reliance on a presumptively valid statute and the

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[5]Reply Brief of Appellants in *Farley v. Department of Human Services*, 621 A.2d 404 (Me. 1993).

likelihood that the taxpayers had been able to pass their costs on to consumers and thus would reap a "windfall". This Court reversed and directed Florida to provide relief to the taxpayers while giving the State considerable latitude in fashioning a remedy. The Court's discussion of the "pass-on" defense includes an observation in a footnote that the State had waived sovereign immunity by authorizing a state refund action. 496 U.S. 219, n.34. The Court further notes that it need not consider whether a "pass-on" defense might be an appropriate limitation on the waiver of sovereign immunity, since the "respondents misdescribe state law." *Id.* Taking this footnote out of context, the Respondents offer the sweeping and untenable claim that a state can defeat federal constitutional imperatives merely by asserting state sovereign immunity, in effect providing neither a predeprivation nor a postdeprivation remedy. This assertion stands logic on its head and would make the Court's lengthy discussion in *McKesson* pointless.

As the author(s) noted in *The Supreme Court, 1989 Term*, 104 HARVARD LAW REV. 40, 192 (1990).

> *McKesson* marks an important step in the Court's evolving approach to ensuring adequate remedies for state violations of constitutional rights. Some form of federal remedy is necessary to guarantee the enforcement of constitutional rights because state remedial jurisdictional principles may limit the availability of relief under a state cause of action, even if brought to enforce federal rights.

While the *McKesson* decision provides the states with considerable flexibility in fashioning remedies for

unconstitutional deprivations, it also makes clear that a state can not refuse to provide any remedy. *Id.* at 195, n.65.

Further, the Respondent's argument defines not only logic but also the facts of this case. The Maine Superior Court expressly found that the State's failure to give the Petitioner class appropriate notice and an opportunity for a hearing violated the Maine Administrative Procedure Act as well as the Due Process Clause.[6] The Respondents never appealed or cross-appealed this decision. The Petitioners' situation is thus analogous to that of the taxpayers in *McKesson*, *i.e.* they were authorized to seek judicial review under Maine law, but the Maine courts unduly circumscribed the remedies available to them. Unlike the class members in *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd sub. nom. Maine v. Thiboutot*, 448 U.S. 1 (1990), the petitioners never had any prior opportunity for a meaningful hearing. The *McKesson* decision is an appropriate basis for requiring the Respondents to provide such a hearing.

D. The Issues Presented by this Petition Generate Continuing Controversy.

The Respondents attempt to deflect the Court's attention from the controversy at hand by pointing out that the statutory provision of 42 U.S.C. § 657(b)(1) at issue in *Wilcox v. Ives*, 864 F.2d 915 (1st Cir. 1988), was superseded by a 1988 amendment.[7] They neglect to note that the 1988

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[6]See the Petition for Writ of Certiorari in this action at 17a-19a.

[7]The Respondents cite a statement in Judge Breyer's concurrence in *Wilcox* to the effect that the 1988 amendment essentially adopted the original position of the U.S. Secretary of Health and Human Services (emphasis added). With all

amendment itself has generated conflict. *See* e.g., *Levesque v. Sheehan*, 821 F.Supp. 779 (D.Me. 1993) and *Kenyon v. Sullivan*, 761 F.Supp. 95 (D.R.I. 1991). They also offer no principled basis for distinguishing the payments at issue here from those involved in the *Bennett* case.

The only real distinction offered between this action and *Bennett* is the Respondents' alleged good faith compliance with federal regulations.[8] Good faith is not a defense to a takings claim, however, and indeed the Respondents can offer no case law authorizing such a defense. This argument also overlooks the fact that Pennsylvania officials also claimed to be acting in good faith. *Bennett v. White*, 865 F.2d at 1400. Most importantly, the Respondents' basic defense, that custodial parents have no interest in child support cognizable under the Takings Clause even before the assignment of rights to the State, sweeps so broadly as to encompass not only the *Bennett* class but also custodial parents who have never received AFDC but have asked the State to collect their support. The State's perspective on this controversy almost guarantees continuing conflict.

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due respect, the Petitioners submit that this is simply not an accurate statement. Judge Bownes noted various circumstances in which class members lost the $50.00 child support payment as a result of the Secretary's construction. 864 F.2d at 917, 922-924, *e.g.*, delays caused by employers, interstate transfers, by intra- state bureaucracies, and by the responsible parents themselves. The 1988 amendment adopted the Secretary's position only with respect to the responsible parents.

[8]The Respondents' claim of faithful adherence to the federal regulation and then to the *Wilcox* final injunction are not entirely consistent with the record below or the record in *Wilcox*.

E. Conclusion

For the reasons previously set forth and stated above, the Petitioners urge this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

Thomas H. Kelley
(Counsel of Record)

Patrick Ende

Robert E. Mittel

Attorneys for
the Petitioners